IN THE

SUPREME COURT OF THE UNITED STATES

October Term 1964

No. _____

WILLIAM L. AUSTIN, - - - - *Petitioner,*

v.

COMMONWEALTH OF KENTUCKY, - - *Respondent.*

BRIEF OF THE KENTUCKY CIVIL LIBERTIES UNION AMICUS CURIAE.

May it please the Court:

This Brief of Kentucky Civil Liberties Union, Inc., as amicus curiae, is filed with the consent of the parties, pursuant to Rule 42 of this Court; written consents, signed by counsel for each party, have been filed.

INTEREST OF AMICUS.

The American Civil Liberties Union has been engaged for more than forty years in defending the Bill of Rights. Foremost of those rights is the First Amendment which declares that "Congress shall make no law . . . . abridging the freedom of speech, or of the press . . . ." It is clearly established that by virtue

of the Fourteenth Amendment this injunction is also applicable to the states. Notwithstanding this injunction, the Petitioner in this case has been convicted under a Kentucky Statute (KRS 436.100) of selling two "obscene" magazines and fined $250.00. This conviction has been sustained by the Court of Appeals of Kentucky (386 S. W. 2d 270 (1965)).

This case is another sad incidence of judicial sanction of the censor. The Amicus believes that the conviction and affirmance constitute that kind of threat to literary freedom and First Amendment guarantees that necessitates the granting of certiorari.

STATEMENT OF FACTS.

The Petitioner was convicted under the Kentucky Obscenity Statute (KRS 436.00) of selling in his bookstore in Paducah, Kentucky, two obscene magazines, "High Heels" and "Spree," pursuant to a complaint sworn out by a citizen of Paducah, Kentucky. At the trial no evidence was introduced by the Commonwealth of Kentucky to show that the Petitioner had personal knowledge of the presence of these magazines in his store or of their contents. The Petitioner was not present in his store at the time the complainant had purchased the two magazines and no inquiry or complaint had been received by the Petitioner concerning these magazines at any time prior to the purchase. The Petitioner operates five news and magazine outlets in Western Kentucky, Tennessee, Southern Illinois and Southeastern Missouri, in addition to the Paducah

bookstore. The bookstore handles approximately 11,000 publication titles every month, including best sellers, technical books, periodicals, newspapers and religious books. In large part the trial court excluded testimony by the Petitioner's expert witness and other witnesses concerning the literary standards of the local and national community and the general acceptance by the community of the type of magazine to which the two magazines in issue belong.

REASONS FOR GRANTING THE WRIT.

(1) This case is illustrative of the difficulties in complying with the standard for determining "obscenity" enunciated in *Roth* v. *United States*, 354 U. S. 476 (1957). In view of these difficulties, certiorari should be granted in order to reconsider the *Roth* standards. There has been considerable comment by members of this Court and by others indicating that the standards are vague and unworkable.[1]

Some of the difficulties have already been suggested to this Court in Amici briefs previously filed with the Court:

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[1] *Roth* v. *United States*, 354 U. S. at 494-495 (Mr. Chief Justice Warren concurring); *Smith* v. *California*, 361 U. S. 147, 157 (Mr. Justice Black concurring); *Roth* v. *United States*, 354 U. S. at 512-514 (Mr. Justice Douglas dissenting); *Roth* v. *United States*, 354 U. S. at 497-498 (Mr. Justice Harlan concurring in part and dissenting in part).

Lockhart and McClure, *Censorship of Obscenity: The Developing Constitutional Standards*, 45 Minn. L. Rev. 5 (1960); Kalven, *Metaphysics of The Law of Obscenity*, Supreme Court Review (Univ. of Chicago Press, 1960). See Brief (pp. 16-41) of the American Civil Liberties Union, *amicus curiae*, in *Jacobellis* v. *Ohio*, *infra*.

1. What are the standards of sex portrayal "in a manner appealing to prurient interest" "and having a tendency to excite lustful thoughts" to be applied in actual cases?

2. How do we determine who is the "average person" whose "prurient interest" or "lustful thoughts" must be aroused before a publication may be adjudged obscene?

3. How do we determine what material is "utterly without redeeming social importance"?

4. Is the determination according to literary or artistic standards or is it left to the happenstance standards of the trial jury?

This case is another example of the impracticality—if not the invalidity—of the *Roth* standards. Full briefing and oral argument will pose the opportunity to reexamine again the tenuous basis upon which this judicial restriction upon First Amendment freedoms incorporated in the Fourteenth Amendment due process protections rests.

(2) Certiorari should be granted to reconsider anew whether *Roth* unnecessarily—if not wrongfully—departed from the clear and present danger test, the tested constitutional standard for allowing the fullest exposition of the principles of a democratic society without endangering competing social interests.

The American Civil Liberties Union, of which the Kentucky Civil Liberties Union is an affiliate, has consistently taken the position with which we concur, that "obscenity," as much as any other form of speech or publication, is entitled to the protection of the First

Amendment. In each instance, then, the issue is whether the speech or publication is used in such circumstances or is of such a nature as to create a clear and present danger that it will bring about a substantive evil which the state has a right to prevent.

We believe that there is no demonstrable connection between the evil which obscenity statutes are intended to avoid and the means chosen to avoid that evil.[2]

There is no clear and present danger that the utterances sought to be prohibited will bring about the evil to be avoided. Based on present day evidences, the unlikelihood of the evils resulting from the conduct suppressed is so clear that no invasion of First Amendment rights is justifiable.

(3) Finally, certiorari should be granted in this case so that "as in all others involving rights derived from the First Amendment guarantees of free expression, this Court [can make] an independent constitutional judgment on the facts of the case as to whether the material involved is constitutionally protected." *Jacobellis* v. *Ohio,* 378 U. S. 184, 190 (1964).

The standard for determining "obscenity" which was enunciated in *Roth* v. *United States,* 354 U. S. 476

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[2]See analysis of sociological studies on this point in Judge Frank's concurring opinion in *U. S.* v. *Roth,* 237 F. 2d 786, 804 2d Cir. 1956); Lockhart & McClure, *Obscenity and the Courts,* 20 Law and Contemp. Probs. 587, 595 (1955); Alpert, *Judicial Censorship of Obscene Literature,* 52 Harv. L. Rev. 40 (1942); see also Jahoda and Staff of Research Center for Human Relations, New York University: *The Impact of Literature, A Psychological Discussion of Some Assumptions in the Censorship Debate* (1954) (results of this study reported in the appendix to Judge Frank's concurring opinion in *U. S.* v. *Roth,* supra); Lockhart & McClure, *Literature, The Law of Obscenity, and the Constitution,* 38 Minn. L. Rev. 295, 387 (1954); and see *Commonwealth* v. *Gordon,* 66 Pa. D. & C. 101 (1949).

(1957) and *Manual Enterprises* v. *Day*, 370 U. S. 478 (1962), is by the Court's own admission "not perfect" (*Jacobellis* v. *Ohio*, 378 U. S. 184 at 191 (1964)), and the line between "obscenity" and expression which is constitutionally protected is admittedly "dim and uncertain" (*Jacobellis* v. *Ohio*, 378 U. S. 184 at 187 (1964)). Thus, the Court has the responsibility, as long as *Roth* is the constitutional key, to examine the whole record in "obscenity" convictions with the greatest care to insure that freedom of speech and of the press is not sacrificed to the censor, over-zealous or not. Cf. *Bantam Books* v. *Sullivan*, 372 U. S. 58 (1963).

CONCLUSION.

For the reasons set forth above certiorari should be granted.

Respectfully submitted,

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Copies of the within Brief were mailed, postage prepaid, to all parties this 20th day of August, 1965.

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